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No. 90-985

IN THE

Supreme Court of the United States

October Term, 1990

JAYNE BRAY, et al.,

Petitioners,

v.

ALEXANDRIA WOMEN'S CLINIC, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF AMERICAN VICTIMS OF ABORTION IN SUPPORT OF PETITIONERS

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STATEMENT OF THE ISSUE DEALT WITH HEREIN

Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

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INTEREST OF THE AMICUS[1]

American Victims of Abortion (AVA) is a national organization of persons whose lives have been adversely affected by abortions, either their own abortion or that of a family member. The objective of AVA is to provide a forum for these individuals to educate legislatures and the public about the tragic consequences of abortion for some women. AVA is composed primarily of women. As such an organization, AVA is uniquely qualified to address the issue herein of whether restrictions on abortion—either public or private—deny women the equal protection of the laws. AVA believes that restrictions on abortion are not motivated by a discriminatory attitude toward women and do not deprive women of the equal protection of the laws. By this Brief, your amicus curiae seeks to provide to the Court its unique perspective on matters relating to abortion.

SUMMARY OF THE ARGUMENT

This Court has held that parties seeking relief under 42 U.S.C. § 1985(3) must demonstrate a conspiracy to deprive them of equal protection motivated by some class-based, invidiously discriminatory animus. Respondents claim that § 1985(3) protects gender-based classifications and that a subclass of a gender-based class, "women seeking abortions," is also a gender-based class. Whether or not § 1985(3) protects gender-based classes, it does not extend to a sub-class of women seeking abortions. This is evident from the analysis of this Court in *Geduldig v. Aiello*, which determined that refusal to extend certain disability benefits to disabilities resulting from abortion was a distinction based on pregnancy, not on gender. Applying this logic, it is clear that women seeking abortions are distinguished by desire to have an abortion, not gender. Congress has also revealed its intent not to equate

[1] This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

witholding of benefits relating to abortion with sex-discrimination in the enactment of special amendments to Title VII and Title IX. If the present Congress does not make this equation, it is apparent that Congress did not intend to make this equation in 1871 when § 1985(3) was enacted (and abortion was prohibited by state criminal laws). Finally, general principles of equal protection established by this Court, drawn from Fourteenth Amendment analysis, reveal that women seeking an abortion do not constitute a gender-based class. Attempting to make them so would so distort equal protection analysis as to make it unrecognizable.

ARGUMENT

I. 42 United States Code § 1985(3) Requires Proof of Invidious Discriminatory Animus Against a Protected Class.

This Court has held that parties seeking relief under 42 U.S.C. § 1985(3) must allege and prove a conspiracy to deprive them of "*equal* protection" motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 834-35 (1983) (quoting *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971)) (emphasis in original).

Respondents claim that § 1985(3) protects not only racial classes from class-based animus (the statute was originally enacted to protect black citizens and their supporters), but also classes distinguished by gender, specifically the class of women. Respondents further claim that within the broad gender-based class of women is a sub-class which applies to them, i.e., women seeking abortions. Thus, they claim protection for this sub-class under § 1985(3).

Whether or not gender-based animus is appropriately included within § 1985(3) — a matter on which your amicus takes no position — a class of women seeking abortions does not qualify for protection under § 1985(3).

II. Congressional Intent, Both at the Time of Passage of 42 U.S.C. § 1985(3) and at the Present, Has Not Been to Make "Women Seeking Abortion" a Suspect Class for Equal Protection Analysis.

A. *The Original Intent of Congress Was to Protect Black Citizens, Their Supporters, and Possibly Others, But Only Where Class-Based Animus Exists.*

The original intent of Congress in enacting 42 U.S.C. § 1985(3) was discussed by this Court in *Scott:*

> [I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than the animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. . . . [We] still withh[o]ld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern — combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments.

Scott, 463 U.S. at 836-37. Thus, the original intent of Congress was to prevent groups such as the Ku Klux Klan from conspiring to deprive black citizens of the equal protection of the laws. It did not intend to create "a federal remedy for all tortious, conspiratorial interferences with the rights of others.'" *Scott*, 463 U.S. at 834 (quoting *Griffin*, 403 U.S. at 101). In *Scott*, this Court left open the question whether § 1985(3) extends to classes other than race, 463 U.S. at 836-37, but it is clear that, at a minimum, there must be some "class-based" animus in order for § 1985(3) to apply.

However, this Court, in *Scott*, carefully avoided the expansion of the classes protected by § 1985(3), a message which the Tenth Circuit understood: "'from *Scott* we get a signal that the classes covered by § 1985 should not be extended beyond those

already expressly provided by the Court.'" *Brown v. Reardon* 770 F.2d 896, 907 (10th Cir. 1985) (quoting *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983), cert. *denied*, 465 U.S. 1103 (1984). The Seventh Circuit has warned against the expansion of such classes:

> It is the obligation of the subordinate jurisdictions to divine the direction of the Court, and the considered dictum in *Scott* cannot be ignored. The question of the classes protected under the provision is one of statutory construction. As construed in *Griffin* and *Scott*, § 1985(3) was enacted to fulfill a highly specific purpose and to meet an unusual condition in the Reconstruction era. Since its decision in *Griffin*, the Court has not expressly provided a remedy to a group or class other than blacks. The import of *Griffin* and *Scott* is that the legislative history of § 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class-based animus against "Negroes and their supporters."

Grimes v. Smith, 776 F.2d 1359, 1366 (7th Cir. 1985).

The expansion of the scope of § 1985(3) to encompass a class of women seeking abortions has been rejected by the Fifth Circuit and the federal District Court for the Central District of California. *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170-72 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990). However, the lower courts, in the case at bar, found that women seeking abortions do constitute a class protected under § 1985(3). *National Organization of Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989); *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

By doing so, the lower courts herein have not only recognized gender as a protectable class under § 1985(3) but also a subclass of women seeking abortions. However, a class of women seeking abortions is distinguished not by its gender, but by

class members' desire to have abortions. More logically, the classes into which this distinction divides people are (1) persons seeking abortions and (2) persons not seeking abortions. While the former class of persons seeking abortions would include women, the latter class would also include women, along with men. Logically, the former class could also include men, such as abortionists seeking freedom to perform abortions and males seeking to procure abortions for a pregnant acquaintance (or seeking to assist a women seeking an abortion). The distinctive factor is not gender, but the practice of abortion. Thus, this is not a gender-based class. As stated by one district court:

> [I]f the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender.

National Abortion Federation v. Operation Rescue, 721 F. Supp. at 1171.

This Court has already resolved the logic which controls this case in its opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Geduldig*, this Court held that a state disability insurance program excluding from its coverage disabilities resulting from pregnancy did not deny women of the equal protection of the law. *Id.* at 492. This Court determined that the distinction in the insurance program was not based on gender, but on pregnancy: "The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 496 n.20. Applying this same logic to the case at bar demonstrates that there can be no gender-based animus against women seeking abortion.

That Congress would not have intended § 1985(3) to reach actions relating to abortion—either by the state or private individuals—is manifested by the congressional focus on Reconstruction era problems. It is also manifested by the fact that, during the period when § 1985(3) was enacted, the most

intense period of legislative activity restricting abortion was underway.[2] As shall be discussed *infra*, neither do general principles of equal protection, established by the Constitution and protected against conspiratorial deprivation by this statute, include protection of a class of women seeking abortions.

B. Recent Expressions of Congressional Intent Show No Provision of Statutory Protection for a Class of Women Seeking Abortions.

Current statutory expressions indicate that the present Congress does not consider the restriction of abortion to be a form of invidious discrimination in violation of the notion of equal protection. This is clear in two provisions.

1. Title VII, The Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964, 78 Stat. 241, as amended, 42 U.S.C. §2000-2(a), provides remedies for sex-based discrimination in employment (as well as discrimination on the basis of race, color, religion, or national origin). It prohibits sex-based classifications relating to the terms and conditions of employment, hiring, firing, and any other decision which would adversely affect an employee.

In the 1976 case of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court considered whether, under Title VII, a

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[2] About 1857, the American Medical Association led a "physicians' crusade" to enact protective abortion legislation effective from the time of conception, a crusade made urgent by the discovery of cell biology and the understanding that individual human life began at conception. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 147-70 (1978); *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary*, 97th Cong., 1st Sess. 474 (Statement of Victor Rosenblum, Professor of Law and Political Science, Northwestern Univ.). Twenty-six of the thirty-six states had statutory prohibitions (abortion had long been illegal at common law) against most abortions by the end of the Civil War, as did six of the ten territories by 1865. Thus, in 1871, when § 1985(3) was enacted, federal legislators would not have intended to include within its protections a class of women seeking abortions barred under criminal statutes.

corporate disability compensation plan which excluded disabilities stemming from pregnancy discriminated against female employees because of their sex. This Court determined that the principles of *Geduldig*, *supra*, borrowed from constitutional equal protection analysis governed the case. Thus, this Court held that, because the class distinction was based on pregnancy and not on gender, Title VII's prohibition on gender-based discrimination was not violated. *Id.* at 136.

Subsequently, Congress effectively overruled that decision, *for purposes of Title VII only*, by enacting the Pregnancy Discrimination Act. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983). The Pregnancy Discrimination Act, 42 U.S.C. §2000(k), provides that — under Title VII — discrimination

> "because of sex" or "on the basis of sex" include[s] . . . [discrimination] because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs,as other persons not so affected but similar in their ability or inability to work . . . .

Thus, for purposes of Title VII, Congress statutorily determined that it would be gender-based discrimination to classify persons on the basis of pregnancy. Of course, this Congressional determination by statute for purposes of Title VII does nothing to alter the underlying principle established by this Court in *Geduldig* and *Gilbert*, that discrimination on the basis of pregnancy is not discrimination on the basis of sex, apart from a statute declaring the contrary for purposes of Title VII. There is nothing in Congress' action which alters the inherent logic, recognized by this Court, that distinctions made on the basis of pregnancy are not sex-based distinctions.

However, *even in Title VII*, where Congress statutorily extended the gender-based class to include pregnancy-related classifications, Congress specifically approved of a classification based on abortion. In enacting the Pregnancy Discrimina-

tion Act, Congress declared that:

> This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion . . . .

Id. Thus, Congress itself has refused to consider unequal treatment of the class of women seeking abortions as the automatic equivalent of sex discrimination.

In the case of *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991), this Court considered discrimination in employment and hiring under the Title VII provisions. Johnson Controls, Inc. had been challenged because of its policy of not allowing women of childbearing capacity to work in lead-exposure areas (based on a fetal-protection policy). This Court concluded that because the class of persons barred from such employment was based on the capacity for pregnancy, it violated the Pregnancy Discrimination Act, stating:

> Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the Pregnancy Discrimination Act means what it says. It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family and her family than her economic role. *Congress has left this choice to the woman as hers to make.*

Id. at 4215 (emphasis added).

Two key facts must be noted about *Johnson Controls*. First, the concept of an equal protection class of women of childbearing capacity is purely one of statutory creation for purposes of Title VII. Second, even where Congress has provided a statutory basis — under Title VII — for a class of women of childbearing capacity and has barred discrimination on the

basis of sex, it has exempted from the definition of sex discrimination any restrictions on abortion. Thus, neither Title VII nor *Johnson Controls* provides any support for the notion that §1985(3) should be extended to encompass a gender-based subclass of women seeking abortions.

2. Title IX, Sex Discrimination in Education

Similarly, when Congress enacted the "Grove City Bill" (The Civil Rights Restoration Act of 1987), amending Title IX of Pub. L. 92-318, 86 Stat. 373, it expressed its belief that classifications on the basis of abortion do not constitute sex discrimination. Title IX prohibits discrimination in education on the basis of sex. Specifically, Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal assistance.

20 U.S.C. §1681.

Pursuant to the purported authority of Title IX, regulations were issued to establish standards that a covered institution must meet to avoid a finding of sex discrimination. The regulations provided, in part, that covered institutions:

> shall treat . . . termination of pregnancy . . . in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such [institution] administers, operates, offers or participates in with respect to students. . . .

34 C.F.R. §106.40 and 45 C.F.R. §86.40.

Under this administrative interpretation of Title IX, withholding of abortion-related benefits was equated with sex discrimination. However, at the first opportunity which Congress had to amend Title IX, Congress enacted the Danforth Amendment to Title IX, specifically rejecting such an interpretation of Title IX. Removing this equation of withholding abortion bene-

fits with sex-discrimination was the focus of Congressional intent behind the Danforth Amendment. This is evident from the opening of Congressional debate, 134 Cong. Rec. S 160 (daily ed. Jan. 27, 1988), to its conclusion. 134 Cong. Rec. S 236 (daily ed. Jan. 28, 1988). The Danforth Amendment provided:

> Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.

20 U.S.C. §1688. Under this statute, an educational institution could refuse to perform, pay for, or provide any benefit (e.g., leave time) relating to abortions without such a refusal being considered gender-based discrimination.

From these provisions, it is clear that the current Congress does not view abortion-discrimination as equivalent to sex-discrimination. It would be preposterous, then, to imagine that in 1871 the Congress which enacted §1985(3) intended to protect a class of women seeking abortion, which was banned by the criminal statutes of the time. Therefore, §1985(3) does not extend protection to women seeking abortion. Congress intended no such thing in 1871, nor does it now.

III. "Women Seeking Abortion" is Not A Suspect Class For Purposes of the Equal Protection Analysis Underlying 42 U.S.C. §1985(3).

Underlying the question of whether women seeking an abortion may constitute a class within the protection of §1985(3) is the issue of what groups have the special characteristics which comprise a suspect class for equal protection purposes. This debate has occurred primarily in the field of constitutional law, under the Equal Protection Clause of the fourteenth amendment. U.S. Const. amend. XIV, §1. While Congress has modified the equal protection principles employed by this Court to analyze statutes prohibiting sex-based discrimination (while declaring that abortion-based distinctions do not equal sex discrimination), this modification affects only these statutes. Thus, apart from these statutes where Congress has specifically decided otherwise, this Court should follow its determination in *Gilbert* "that the Fourteenth Amendment standard of discrimination is coterminous with that applicable" to a statute applying equal protection standards. *Gilbert*, 429 U.S. at 154 n.6. The body of law this Court has developed with regard to constitutional equal protection, where not statutorily altered, is the most valuable source of equal protection analysis for the present issue of whether women seeking an abortion are a class appropriate for protection under §1985(3).

A. *The Original Understanding of the Equal Protection Doctrine.*

Both the history of section 1 of the fourteenth amendment and the scope of its originally intended enforcement are somewhat ambiguous. U.S. Const. amend. XIV, §1. This Court first construed the fourteenth amendment in *The Slaughter-House Cases*, 83 U.S. 57 (1873), only five years after the amendment had been ratified (and only two years after the enactment of §1985(3)). As this Court noted, "[f]ortunately that history [of the fourteenth amendment] is fresh within the memory of us all." *Id.* at 68. The *Slaughter-House* Court found that the "pervading purpose" of the amendment was "the freedom of the slave race, the security and the firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

More specifically, this Court stated that "[t]he existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by . . . [the equal protection] clause." *Id.* at 81. This Court concluded with a forecast: "[w]e doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Id.*

Seven years later in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court again had occasion to review the history of

the fourteenth amendment. The *Strauder* Court found that the fourteenth amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States." *Id.* at 306. This Court, therefore, struck down a state statute which restricted jury duty to whites, but indicated that the restriction limiting jury duty to male citizens over the age of twenty-one would be upheld. This Court held that the state could not discriminate on the basis of race, but "[i]t may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this." *Id.* at 310. In 1953, this Court looked again to the history of the fourteenth amendment to resolve the issue of school segregation. *Brown v. Board of Education*, 347 U.S. 483 (1953). Time seemed to have obscured the original meaning of the fourteenth amendment, and the *Brown* court dismissed the historical evidence as "inconclusive." *Id.* at 489.

Shortly after Brown was handed down, Alexander Bickel made his own detailed inquiry into the circumstances surrounding the adoption of the fourteenth amendment. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955). By looking at both the impact of the amendment at the time of its ratification, and considerations of its future effects, Professor Bickel concluded that "section 1 . . . deals not only with racial discrimination, but also with discrimination whether or not based on color." *Id.* at 59-60. Professor Bickel based this finding on the fact that there was an earlier alternative to section 1 that would have applied specifically to race alone that was rejected in committee. *See id.* at 59. Bickel also believed that the drafters of the fourteenth amendment "emulated the technique of the original framers, who were . . . responsible to an electorate only partly receptive to the fullness of their principles, and who similarly avoided the explicit grant of some powers without foreclosing their future

assumption." *Id.* at 62. In short, Bickel argued that the language of section 1 of the fourteenth amendment is purposefully broad enough to encompass "further strides toward the ideal of equality" that are consistent with "the trend in public opinion." *Id.* at 63-64.

Judge Robert Bork would not take such a broad view of the original intentions of the framers of the fourteenth amendment. Bork claims that "[i]t is clear that the ratifiers . . . did not think they were treating women as an oppressed class similar in legal disadvantages to the newly freed slaves," R. Bork, *The Tempting of America: The Political Seduction of the Law* 329 (1990), and therefore it was never contemplated that "racial and sexual groups needed special protection to the same degree." *Id.* at 66 n.*. Regardless of whose analysis one accepts, both would probably agree that the thirty-ninth Congress would not have passed an amendment that would have given women immediate social and legal equality with men. *See* Bickel, *supra*, at 63-64; and *see* Bork, *supra*, at 329. Regardless, Bork's analysis seems to reflect the approach that the Court has ultimately taken with respect to racial and gender classifications.

B. *Present Equal Protection Analysis*

This Court has traditionally subjected the classifications used in economic and social welfare legislation to a rational basis test. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). For legislation to pass this test, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1919). This Court's inquiry into the purpose of the classification generally does not go very far. "Where . . . there are plausible reasons for [the legislature's] action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *United States Railroad Retirement Bd. v.*

Fritz, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). The rational basis test ensures against "arbitrary and unreasonable government," *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1948) (Jackson, J. concurring.), while allowing the legislature maximum latitude in drawing necessary statutory classifications.

Legislation that classifies on the basis of race or national origin, however, has historically been treated with less deference by the Court. *See, e.g., Strauder*, 100 U.S. 303; *and Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." *Id.* at 216. As further developed by this Court, the strict scrutiny test requires that a classification be narrowly tailored to further a compelling government interest. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). This test has come to be applied not only to statutes that classify on the basis of race and national origin, but also those classifications that infringe upon the exercise of a fundamental right by a particular group. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Shapiro v. Thompson*, 394 U.S. 618 (1969). This two-pronged use of the equal protection analysis owes its origin to Justice Stone's famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).[3]

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[3] There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition,

(footnote continued)

Recently this Court has employed a test more rigorous than the rational basis test, yet less searching than strict scrutiny. Intermediate scrutiny requires that the legislative classification be substantially related to an important government interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982). This standard has been applied in the context of discrimination based on gender, *see id.*, alienage, *see, e.g., Plyler v. Doe*, 457 U.S. 202 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971), and illegitimacy. *See, e.g., Matthews v. Lucas*, 427 U.S. 495 (1976); *Trimble v. Gordon*, 430 U.S. 762 (1977). As can be seen from this brief discussion, this Court's approach to the two-pronged equal protection analysis presently consists of three levels of scrutiny. Legislation that draws classifications on the basis of race or national origin, or that impinges on a fundamental right, is subject to strict scrutiny and is almost always found unconstitutional. Legislation classifying on the basis of gender, alienage, or illegitimacy is scrutinized at an intermediate level, and all other statutory distinctions must be rationally related to a legitimate state purpose.

C. *Gender Discrimination*

The application of the intermediate standard of review in the context of gender discrimination is of fairly recent origin. In *Reed v. Reed*, 404 U.S. 71 (1971), this Court used the rational basis test to strike down a state statute that favored men over women in determining who would administer the estate of one who dies intestate. *Id.* at 76 (citing *Royster*, 253 U.S. at 412, 415). The Reed court found that "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violate[d] the Equal Protection Clause."

Footnote 3 continued

> which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 152 n.4.

Id. at 77 (citation omitted). Conversely, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), Justice Brennan, writing for a plurality of four, stated that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Id.* at 682. The *Frontiero* Court found unconstitutional a federal statute that provided larger military housing allowances and medical benefits to the spouses of male personnel, than to the spouses of female personnel. *Id.* at 678-679.

After canvassing both of these approaches to equal protection analysis, this Court settled on an intermediate standard of review in *Craig v. Boren*. 429 U.S. 190. Craig dealt with a state statute that prohibited the sale of 3.2% beer to males under 21 and females under 18 years of age. *Id.* at 192 n.1. Justice Brennan, again writing for the Court, stated that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 197. Under this standard the statute was found violative of equal protection. *Id.* at 210. More recently, this Court applied this same standard of review to allow a male to attend an all-female, state-supported nursing school. *See Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

Some gender discrimination cases, however, have not invalidated the statutory distinctions drawn between men and women. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), this Court was required to review a promotion policy of the United States Navy which allowed women a longer period of time for promotion prior to mandatory discharge than was allowed men. *Id.* at 500. The *Schlesinger* Court found that, unlike the statutes at issue in *Reed* and *Frontiero*, "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers . . . are not similarly situated." *Id.* at 508. Similarly, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), a case dealing with the Military Selective Service Act that permitted only men to be drafted, the Court found that "[m]en and women . . . are simply not similarly situated for purposes of a draft or registration for a draft." *Id.* at 78. The *Rostker* Court went on to say that "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Id.* at 79. In both cases, the statutory classification was upheld based on the differences between the sexes.

Thus, in the area of gender discrimination, there is a distinction between those statutory classifications that bear no relationship to actual differences between men and women, and those classifications that are predicated upon those differences. The former are held to a standard of intermediate scrutiny, while the latter are upheld as long as the distinction is rationally related to a legitimate government interest. Nowhere is this same distinction more apparent than in the context of pregnancy regulation.

Geduldig v. Aiello, 417 U.S. 484, presented the question of whether a state disability insurance program, that excluded from coverage disabilities resulting from pregnancy, denied women equal protection. *Id.* at 492. This Court found that there was no denial of equal protection because gender discrimination, as previously defined in *Reed* and *Frontiero*, *did not exist with respect to the disability plan*. *Id.* at 496 n.20. The Geduldig court stated that

> [t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical conditionpregnancyfrom the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex based classification . . . . The program divides potential recipients into two groupspregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id. This case has caused great consternation among those

arguing for an equal protection right to abortion. Logically, if pregnant women are not similarly situated with respect to nonpregnant persons, a law prohibiting abortion would not be a denial of equal protection to all women as a class, and therefore, not gender discrimination. *See* Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 985 (1984). The statute would only need pass the rational basis test for the purposes of equal protection analysis. Thus, several constitutional scholars have devised "equal protection models" in an effort to get around *Geduldig* while at the same time trying to provide some sort of constitutional basis for the right to abortion.

D. *Proposed Alternative Equal Protection Models*

1. The Equal Treatment — Assimilationist — Approach

The assimilationist model, as set forth by Professor Wendy Williams, is essentially based upon two propositions. First, generalizations that are based entirely on a person's sex, regardless of where those generalizations come from, are not permissible. Second, even if a law is not based on a sex generalization, those wishing to uphold the law should carry the "burden of justification, if the law has "a disproportionately negative effect upon one sex." Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Social Change 325, 329-330 (1984-85) (The latter proposition Williams refers to as the "disparate effects theory" which would "permit[] . . . a challenge to neutral rules based on a male prototype." *Id.* at 364.). While Professor Williams agrees that both the assimilationist model and the special treatment model, *see infra*, can be the basis of "positive rights" for women, *id.* at 375, she asserts that assimilation is the best approach because "the equal protection clause is unlikely to ever be interpreted to require equal treatment because an excluded class is different from the included class." *Id.* at 361 n.143.

The purpose of this model is to prevent legislators from classifying on the basis of sex, and instead, force them to

"classify on the basis of the trait or function or behavior for which sex was used as a proxy." *Id.* at 329 (As examples of these "traits" Professor Williams states that "[s]trength, not maleness. would be the criterion for certain jobs; economic dependency, not femaleness, the criterion for alimony." *Id.*). The ultimate objective is "to get the law out of the business of reinforcing traditional, sex-based family roles." *Id.* at 352. To achieve this objective, Professor Williams would define equality by using an androgynous prototype which "requires sex neutral schemes that take into account the normal range of human characteristicsincluding pregnancy." *Id.* at 369. She would also subject all sex-based classifications to strict judicial scrutiny. *Id.* at 363 n.144. Thus, Williams' assimilationist approach redefines equality by using an androgenous standard rather than a male or female standard.

Feminist critics of the assimilationist model define it as a model that "treat[s] men and women as if they were interchangeable," thereby "minimiz[ing] the significance of . . . [their] reproductive differences." *Kay, Models of Equality*, 1985 U. Ill. L. Rev. 39, 40 (1985) [hereinafter Kay I]. Others characterize it as a model that recognizes "no real differences between the sexes . . . that cannot be dismissed as illusory sex-stereotypes." Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U. L. Rev. 513, 538 (1983). Oddly enough, these critics seem to agree that the worst problem with the model is that it accepts "maleness" as the standard by which assimilation is to occur. *Id.* at 539; *See also*, Law, *supra*, at 968; L. Tribe, *American Constitutional Law* § 16-29, 1583 (1988). In so doing, the model becomes "incapable of defining sexual equality in the context of sex-specific conditions," Krieger & Cooney, *supra*, at 538, such as reproduction.

Krieger & Cooney argue that this flaw in the assimilationist model "permits a denial of equality of effect to women who are either unwilling or unable to assimilate to . . . [the male] norm." *Id.* at 539. To Krieger and Cooney, the model does not go far enough. While the assimilationist view would assure

equal treatment to those similarly situated (*i.e.* all those who fit within the male prototype), it would not avoid a result similar to that reached in *Geduldig* where women are not similarly situated to men with respect to pregnancy. Professor Kay levels the same criticism when she states that the model is "inadequate . . . for those few situations where the law must confront immutable sexual reproductive differences." Kay I, *supra*, at 41.

Obviously, if the assimilationist model uses a male prototype, there is no escaping the Court's result in *Geduldig*. The androgenous prototype, however, is just as problematic. First, what exactly is androgyny? It is defined as "[h]aving the characteristics or nature of both male and female." *Webster's Ninth New Collegiate Dictionary* 84 (1985). But, for the purposes of equal protection analysis, which characteristics are included in the androgenous prototype? Certainly, Professor Williams would include pregnancy, but beyond that, she offers little guidance. Second, Professor Williams, like others noted below, is simply redefining the relevant equal protection classification. While the Court defines the relevant equal protection classifications as men and women for the purposes of gender discrimination, Williams would define the classification as androgenous people. This definition means that any legislative distinction drawn between men and women, however unsimilarly situated, would be subjected to strict judicial scrutiny.

2. The Episodic Approach

Professor Kay's episodic model is premised on the belief that "reproductive behavior is episodic and temporary." Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L.J. 1, 24 (1985) [Hereinafter Kay II]. Kay advocates an "episodic" approach because, pregnancy will "never satisfy the comparability standard inherent in the . . . [assimilationist approach] for, by definition, there are no similarly situated pregnant men." Kay I, *supra*, at 81. The episodic model draws a distinction based on the duration and effects of reproductive behavior. For the purposes of the episodic approach, reproductive behavior of females lasts nine months, while that of males "is quite brief in duration." Kay II, *supra*, at 24. Also, the effects of reproductive behavior are more debilitating to a woman's opportunities than to a man's. *Id.* at 26, 27. Episodic analysis "enable[s] the law to treat women differently than men during a limited period when their needs may be greater . . . as a way of ensuring that women will be equal to men with respect to their overall . . . opportunities." *Id.* at 34.

The purpose of this model is to "compensat[e] for biological reproductive sex differences that would otherwise handicap women and impede their realization of equal . . . opportunity." *Id.* at 18. In the context of *Geduldig*, episodic analysis requires that the "relevant reference group . . . [be] limited to those persons who have engaged in reproductive behavior while continuing to work." *Id.* at 30. This reclassification results in the conclusion that pregnant women are similarly situated with respect to men and nonpregnant women, and are therefore entitled to the same benefits that accrue to the latter class. According to Kay, this includes the benefit of being free of burdens from which others in the group are free, such as pregnancy. According to Professor Kay, this result furthers the concept of equality of opportunity by ensuring that, just like men, women are not disadvantaged by engaging in reproductive behavior. *Id.* at 26. The same reasoning would obviously apply to a woman's desire to terminate her pregnancy. *Id.* at 23 n.125. A law restricting abortion would treat some individuals who had engaged in reproductive behavior differently from others who had done the same.

The thought of this Court declaring "persons who engage in reproductive behavior" a suspect or even quasi-suspect class is ridiculous. People who engage in reproductive behavior can hardly be considered a "discrete and insular minority" in the sense that Justice Stone employed that term in his famous *Carolene Products* footnote. 304 U.S. at 144 n.4. Nor would this classification be considered suspect since "it is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of

political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Finally, if strict scrutiny is not applicable to classifications based on mental retardation, *see Cleburne*, 473 U.S. 432, wealth, *see Rodriguez*, 411 U.S. 1, and age, *see Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), it is hard to imagine that this Court will set aside for special consideration those who engage in reproductive behavior.

Secondly, the episodic model confuses reproductive behavior with the results of that behavior. A pregnant woman is obviously not engaging in reproductive behavior for nine months in the sense that she is perpetually engaging in sex during the term of her pregnancy. Rather, the pregnancy is a possible result of her having engaged in reproductive behavior (*i.e.* having had intercourse). This is an important distinction, because it means that Professor Kay defines the duration of a male's reproductive behavior to include only the act, while she defines the duration of a female's reproductive behavior to include both the act and a possible result. It is not a necessary result of engaging in reproductive behavior that a woman becomes pregnant. Therefore, all women who engage in reproductive behavior are not similarly situated; some become pregnant while others do not. For the purposes of the Court's equal protection analysis, Professor Kay's reproductive behavior classification, in reality, leads to the same result that the *Geduldig* Court found: persons who engaged in reproductive behavior and happened to become pregnant, verses persons who engaged in reproductive behavior and did not become pregnant. Thus, there would be no gender-based discrimination because an abortion restriction would apply only to those who happened to become pregnant, and not an entire gender as a class.

3. The Special Treatment Approach

The special treatment model attempts to redefine equal protection analysis by focusing on the "biological reproductive

differences between men and women." Law, *supra*, at 955. This model, like the episodic approach, rejects the assimilationist premise that "sex-based biological differences are wholly insignificant . . . [because] changes in social, cultural, and legal arrangements [can] not make [biological] differences disappear . . . [and] assimilation seems often to mean assimilation to a male norm." *Id.* at 966, 968. The purpose of the special treatment approach is to point up the biological differences between men and women that "have been used to justify sex-based legal and cultural limitations on human potential that do not reflect any real difference between men and women and that enforce the inferiority of women and the dominance of men." *Id.* at 969.

Professor Law, a strong advocate of the special treatment approach, is not shy about stating her divergence from the traditional constitutional concept of equality. "[T]he appropriate function of the law is not to enforce a general vision of what men and women are really like." *Id.* According to Law's version of the special treatment approach,

> laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state interest . . . . [T]he state should bear the burden of justifying its rule in relation to either proposition.

Id. at 1008-1009. The test requires a determination of whether the law applies to reproductive biology and a determination of whether the law perpetuates the oppression of women. If it does oppress women, the law is subjected to strict scrutiny. *Id.* at 1013-1014. As one can easily see, this is a far more searching inquiry than this Court has ever applied under the guise of equal protection analysis. In applying this test to abortion, Law finds immediately that any restriction of the "right" to abort could conceivably oppress women. "By restricting access to abortion, the state necessarily denies the capacity of women as independent moral decision makers." *Id.* at 1019. A law

impinging on a woman's ability to get an abortion "dramatically impairs the woman's capacity for individual self determination, [and] imposes a crushing restraint on the heterosexual woman's capacity for sexual expression." *Id.* at 1017, 1019. Thus it is clear that under Professor Law's analysis, any law restricting abortion would be subjected to strict scrutiny. Implicit in this realization is the conclusion that any such law should be struck down because "such laws enforce the invasion of women's bodies." *Id.* at 1017.

It is in this camp—special treatment—that Professor Laurence Tribe would pitch his tent. While Tribe would agree with some of Professor Kay's analysis, his approach, in the main, is similar to the work of Professor Law. Like Kay, Tribe would agree that "the proper comparison in *Geduldig* was . . . between female employees who had engaged in reproductive behavior and male employees who had done likewise." L. Tribe, *supra*, § 16-29 at 1584 (citing Kay II, *supra*, at 30, 31, 35.). Tribe also agrees that equality of opportunity should be the focus of equal protection analysis for laws dealing with pregnancy. *Id.* (citing Kay II, *supra*, at 26.). Tribe would agree with Law, however, that a woman's role in reproduction is special, and therefore requires special treatment by the courts and the legislatures. *Id.* § 16-29 at 1583 (quoting Law, *supra*, at 1007.). Tribe bases his equal protection analysis on "an antisubjugation principle, which aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens." *Id.* § 16-21 at 1515. Under this analysis, strict scrutiny would be applied to legislation that "given . . . [its] history, context, source, and effect, seem[s] most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward a subjugated group, or a pattern of indifference to the interests of that group." *Id.* § 16-21 at 1520. Given that "[a]bortion . . . involv[es] the intensely public question of the subordination of women to men through the exploitation of pregnancy," *id.* § 15-10 at 1353, there exists a "constitutionally problematic subjugation of women in the law's indifference to the biological reality that

sometimes requires women but never men to resort to abortion . . . to . . . retain control of their own bodies." *Id.* § 15-15 at 1385. Thus with Tribe, a law restricting abortion would violate his antisubjugation principle because carrying a child to term subordinates women as a class. *See id.* § 15-10 at 1354 ("Even a woman who is not pregnant is inevitably affected by her knowledge of the power relationships thereby created.").

4. A Critique

Proponents of the special treatment approach simply cannot escape the fact that not all women are pregnant women. Even though virtually all women have the capacity to become pregnant, it does not follow that laws that draw distinctions on the basis of reproductive biology discriminate on the basis of gender. Contrary to Professor Tribe's assertions, such distinctions do not affect the female gender as a whole, but instead, only those members of the gender that happen to be pregnant. Absent gender discrimination or a determination that pregnancy is a suspect classification, this Court would apply a rational basis test to abortion legislation, even though Professor Tribe might wish to apply strict scrutiny.

The special treatment approach is antithetical to traditional equal protection jurisprudence. This Court has a long history of ensuring that similarly situated persons are treated similarly. *See Royster*, 412 U.S. at 415. Special treatment analysis admits that men and women are not similarly situated with respect to reproductive biology, but then requires the legislature to either ignore these differences or enact laws that will compensate women as a class for those differences. Men and women are then not treated equally, as the Constitution requires, but rather women as a class are given more protection of the laws than similarly situated men in an effort to equalize the effects of pregnancy. Women would certainly benefit from the special treatment approach, just as the poor would benefit from a redistribution of wealth, but this benefit would come at the expense of the constitutional concept of equality under the laws.

Ultimately, the special treatment model, like the episodic approach, is really not a model of equality — in the sense of equal treatment — but instead, it is a "liberal ratchet," *see* R. Bork, *supra*, at 92,[4] to be used to reach what some believe are socially desirable results. Professor Kay cites Professor Ronald Dworkin for the proposition that the equal protection clause embodies two different types of rights: the right to equal treatment and the right to treatment as an equal. R. Dworkin, *Taking Rights Seriously* 276-277 (1977); *see also* Kay I, *supra*, at 87; Krieger & Cooney, *supra*, at 553-554. The latter of these two rights Dworkin defines as "the right . . . to be treated with the same respect and concern as anyone else." R. Dworkin, *supra*, at 227. Dworkin further states that "the right to treatment as an equal is fundamental, and the right to equal treatment, derivative." *Id.*[5] From this, "[e]quality can be seen as an individual right to equal treatment or as a social policy promoting equality of effect." Krieger & Cooney, *supra*, at 554. Thus, the argument is that some classes of people are entitled to treatment as equals even though they are not similarly situated with those with whom they are asserting equality. This, in short, is the underlying argument of both the episodic approach and the special treatment model.

In further discussing the "right to be treated as an equal," Dworkin warns that "we must be careful not to overstate what . . . [the right to be treated as an equal] means." R. Dworkin, *supra*, at 227. "An individual's right to be treated as an equal means that his potential loss must be treated as a matter of concern, but that loss may nevertheless be outweighed by the

[4] Judge Bork uses this term in characterizing Justice Brennan's view of section 5 of the fourteenth amendment. In discussing Brennan's opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), Bork states that "Justice Brennan was forced into the position that the power to enforce [under section 5] was a liberal ratchet, it could go only in one direction."

[5] Dworkin gives the following example that is also quoted in Krieger & Cooney, supra, "If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug."

gain to the community as a whole." *Id.* Assuming for the sake of argument that such a right exists,[6] it in no way follows that a law restricting abortion denies pregnant women equal treatment as Dworkin defines that concept. Clearly, using Dworkin's analysis, the gain to society, e.g., of its continued existence through successive generations outweighs the temporary inconvenience to those women who become pregnant. Thus, even Dworkin's analysis would place limits upon the concept of equality of results.

This Court has never interpreted the equal protection clause to require that statutory distinctions between similarly situated people achieve equal results among those people. Similarly, this Court has never held that people who are not similarly situated must be treated equally by a legislature, if the statutory classification is rational. Therefore, it is beyond reason to assert that this Court should require legislatures to ensure equal results among groups that are clearly and admittedly not similarly situated. See Coleman, Roe v. Wade: *A Retrospective Look at a Judicial Oxymoron*, 29 St. Louis U.L.J. 7, 38 (1984) ("Equal treatment [sometimes] produces unequal results, but the results are essential to preserve individual rights for everyone.").

In analyzing Professor Tribe's version of the special treatment approach, its extremely broad application is immediately apparent. The antisubjugation principle would invalidate all types of legislative classifications, not just those based on the biological differences between men and women. Classifications based on age, sex, wealth, mental retardation, gender, illegitimacy, and alienage would all be subjected to strict judicial scrutiny. In fact, any group, or for that matter any individual, who could lay claim to somehow being "subjugated" by the government, could seek redress in the courts. Actual, perceivable differences between groups of people could no longer be taken into account by legislatures. Instead, legislators would draw distinctions uneasily, knowing that if a class is

[6] Your amicus neither admits nor condones the existence of such a right.

somehow subjugated by the distinction, the law would have to be narrowly tailored to meet a compelling governmental objective.

This result clearly violates a statement of this Court that Professor Tribe is fond of quoting: "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (Tribe uses this quote to attack the assimilationist model, L. Tribe, *supra*, at 1583, but it is just as applicable to the special treatment approach.). This Court has long recognized and given deferential treatment to the prerogative of a legislature to draw distinctions between groups that are not similarly situated. *See, e.g., Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931); *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362 (1940); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914); *Miller v. Wilson*, 236 U.S. 373 (1915); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928). In *Tigner v. Texas*, 310 U.S. 141 (1940), this Court through Justice Frankfurter stated that

> [t]he equality at which the equal protection clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws," and the laws are not abstract propositions. They do not relate to abstract units A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

Id. at 147. Tribe's antisubjugation principle posits a "disembodied equality" that would completely curtail the legislatures' ability to draw necessary statutory distinctions between people who are not similarly situated.

Professor Law's version of the special treatment approach is a similar attempt at redefining the traditional concept of equality, and would therefore violate the same accepted norms of constitutional adjudication. The oppression standard as

applied to legislative classifications, would result in the same evil that the antisubjugation principle would propagate. In the context of gender discrimination alone, it refuses equal treatment for both sexes, because it is obsessed with compensating pregnant women for their pregnancy. In short, Professor Law does not want equal protection of the laws; she wants the law to effectuate her personal concept of equality.

All of the above equal protection models have thus failed to endow pregnancy with the necessary attributes that would compel this Court to apply heightened scrutiny to a legislative restriction on abortion. Both the assimilationist view and the episodic approach would redefine the constitutionally relevant group so that pregnant women would be viewed as similarly situated with nonpregnant persons. These approaches are unavailing because this Court is just as unlikely to recognize androgyny as a classification as it is to find that people who engage in reproductive behavior are a suspect class. In admitting that men and women are not similarly situated with respect to reproductive biology, episodic analysis and the special treatment approach both fail to invoke heightened scrutiny. Equality of the laws simply cannot and should not be perverted to require an equality of results ensured by the government among persons who are not similarly situated.

As may be seen from this analysis, the underlying notion in the case at bar—that principles of equal protection somehow require that women be allowed free access to abortion-on-demand—is flawed. For purposes of § 1985(3) as for purposes of the fourteenth amendment, women seeking abortions are not a suspect class. To recognize them as such, as the lower courts have done, is to expand the notion of equal protection beyond recognition.

CONCLUSION

For the foregoing reasons, your amicus urges that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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